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BEFORE THE ADMINISTRATIVE REVIEW BOARD
U.S. DEPARTMENT OF LABOR

CASE NO: 2010-FRS-00030

In The Matter of:

ROBERT POWERS,
Complainant

v.

UNION PACIFIC RAILROAD,
Respondent

AMICUS CURIAE BRIEF OF THE PROJECT ON GOVERNMENT OVERSIGHT
IN SUPPORT OF FORDHAM V. FANNIE MAE MAJORITY

The Project On Government Oversight (POGO) submits this *amicus* brief in support of burdens of proof that have been the cornerstone for almost all modern whistleblower laws since 1989. Congress enacted those laws because the First Amendment burdens in *Mt. Healthy School District v. Doyle*, 429 U.S. 274 (1977), which also governed early whistleblower statutes, were so unrealistically burdensome they created a chilling effect that prevented exposure of abuses of power, which are sustained by secrecy. POGO was obligated to act because the dissent in *Fordham v. Fannie Mae* seeks to roll back whistleblower rights nearly forty years.¹ The dissent seeks not only to overturn repeated, unanimous congressional mandates, but also the two-part foundation test the Supreme Court originated in *Mt. Healthy* for retaliation against employees who speak out against waste, fraud, abuse, and corruption, and who often work with Congress

¹ *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (October 9, 2014).

and law enforcement officials.² Those whistleblowers do so to prevent threats against the public interest.

This extraordinary position reflects the dissenting court's bias, which is not supported by statutory language or legislative history from the Whistleblower Protection Act of 1989 (WPA) or 15 corporate whistleblower statutes enacted since the WPA became law. The dissent's position is also unsupported by any record of problems that it predicted since passage of the WPA. Even if the dissent's concerns were valid, the Board does not have the authority to reverse Congress. Besides asserting the exercise of authority the Board does not have, the dissenting court's proposal would create opposing legal standards between whistleblower rights of corporate and government workers. The landmark rollback of whistleblower rights sought by the dissent in *Fordham* should be rejected.

INTEREST OF THE *AMICUS*

The Project On Government Oversight, founded in 1981, is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Working with whistleblowers for such purposes is an integral part of POGO's mission, and ensuring strong whistleblower protections is one of our core policy priorities. POGO helped lead efforts to pass and strengthen the Whistleblower Protection Enhancement Act ("WPEA"), testifying about the legislation before Congress, lobbying for the strongest possible provisions, urging the public to take action, and organizing critical support.

² The test first requires the employee to prove a *prima facie* case of retaliation. If the employee succeeds, the burden of proof shifts to the employer to prove it would have taken the same action anyway for independent reasons in the absence of protected speech. *Mt. Healthy*, 429 U.S. at 287.

Upholding Congress's intent is of great concern to POGO, and our nation's whistleblower protection laws, which were created to protect the public interest, should not be eviscerated.

BACKGROUND

In *Fordham* the majority applied the two-part test for *Mt. Healthy* burdens of proof that has been modified and reaffirmed in the Whistleblower Protection Act, 5 U.S.C. § 1221, and 15 subsequent corporate whistleblower statutes, including provisions in the Sarbanes Oxley (SOX) law.³ The statutory test requires that the employee demonstrate by a preponderance of the evidence, in challenges of any alleged retaliation, that protected activity was a contributing factor. 5 U.S.C. § 1221(e)(1). If the employee succeeds, the burden of proof shifts to the employer to prove by clear and convincing evidence that it would have taken the adverse action against the employee in the absence of protected activity. 5 U.S.C. § 1221(e)(2). The majority's decision in *Fordham* reflected this two-part test. The dissent, however, contends that employers should be able to apply the "independent justifications" defense twice, both to rebut that protected activity was a contributing factor and to prove it would have taken the same action even if a whistleblower had remained a passive, silent observer. If the dissenting opinion is followed, the employer would prevail if the *whistleblower* cannot *disprove* alleged independent

³ Pipeline Safety Improvement Act, 49 U.S.C. § 60129(b)(2)(B); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121(b)(2)(B); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 U.S.C. § 5851(b)(3); Federal Rail Safety Act (U.S. rail workers) 49 U.S.C. § 20109(c)(2)(A)(i); National Transportation Safety and Security Act (U.S. public transportation) 6 U.S.C. § 1142(c)(2)(B); Consumer Product Safety Improvement Act (U.S. corporate retail products) 15 U.S.C. § 2087 (b)(2)(B), (b)(4); Sarbanes Oxley Act (U.S. publicly-traded corporations), 18 U.S.C. § 1514(b)(2)(c); Surface Transportation and Assistance Act (U.S. corporate trucking industry) 49 U.S.C. § 31105(b)(1); American Recovery and Reinvestment Act of 2009 (U.S. Stimulus Law) P.L. 111-5, Section 1553(c)(1); Affordable Care Act, sec. 1558(b)(2); Food Safety Modernization Act (U.S. food industry) 21 U.S.C. § 1012(b)(2)(C) and (b)(4)(A); Dodd Frank Act (U.S. financial services industry) 12 U.S.C. § 5567; National Defense Authorization Act of 2013, P.L. 112-139, sections 827-28, (112th Cong., 2d Sess.), 10 U.S.C. § 2409(c)(6), 47 U.S.C. § 4712(c)(6); Moving Ahead for Progress in the 21st Century Act (MAP 21), 49 U.S.C. § 30171(b)(2)(B), (c)(3), and Seaman's Protection Act, 46 U.S.C. § 2114(b). The SOX burdens of proof are incorporated by reference from AIR21.

justifications as pretexts by a preponderance of the evidence. Compared to the employers' previous burden by clear and convincing evidence, the dissenting opinion would reverse the parties' respective burdens, leaving the employee with a far more difficult challenge than even under the 1977 *Mt. Healthy* standard.

ARGUMENT

I. CORPORATE WHISTLEBLOWER STATUTORY BURDENS OF PROOF ARE AN OUTGROWTH OF THE WHISTLEBLOWER PROTECTION ACT.

There is no support for the dissent's assertion that the WPA is irrelevant for a SOX case, because the WPA "is an entirely different statute serving an entirely different purpose...." *Fordham*, slip op. at 46-7. The dissent references various civil rights and employment discrimination cases as progenies for SOX whistleblower rights. But it offers no reference to precedents or legislative history that the WPA is irrelevant for any of the 15 relevant corporate whistleblower laws to prove this assertion. All whistleblower rights are grounded in principles protecting freedom of dissent, not barring discrimination based on race, sex, or religion. Since Congress created statutory whistleblower rights in the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8), they have been interpreted under the *Mt. Healthy* decision's two-part test.⁴

Contrary to the dissent's assertion, the statement of purposes for both government and corporate whistleblower laws demonstrate complementary, if not identical, perspectives. As Congress explained in 1978 for government workers:

⁴ See, e.g., *Warren v. Department of the Army*, 804 F.2d 854 (Fed. Cir. 1986).

Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.⁵

Senator Patrick Leahy (D-VT), lead sponsor for the pioneering SOX whistleblower provision, explained its purpose:

This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way.⁶

The only thing different is the context. Contrary to the dissent's assertion, this Board has recognized the parallel relationships between the WPA and corporate whistleblower statutes, including SOX and AIR21.⁷

⁵ S. Rep. No. 95-969, at 8 (1978).

⁶ 148 Cong. Rec. S. 7420 (daily ed. July 26, 2002).

⁷ *Bechtel v. Competitive Tech., Inc.*, ARB No. 09-052, 2011 WL 4915751, at *18, n.124 (noting that SOX incorporates AIR21's burdens of proof which were ultimately "modeled after" the WPA); *Kester v. Carolina Power and Light Co.*, ARB No. 02-007, 2003 WL 25423611, at 8, n.15); *Powers v. Pinnacle Airlines, Inc.*, 2003 WL 25840846, at 12 (Energy Reorganization Act and WPA jurisprudence provide the framework for litigation under AIR21).

II. THE DISSENT'S PROPOSAL WOULD DEFEAT CONGRESS'S EXPLICIT PURPOSE FOR CREATING WHISTLEBLOWER PROTECTION ACT BURDENS OF PROOF.

The context for the WPA burdens of proof was congressional dissatisfaction with the *Mt. Healthy* test. Along with a then-hostile whistleblower protection agency, the U.S. Office of Special Counsel (OSC), frustrations with burdens of proof for the whistleblower protection provision of the Civil Service Reform Act (CSRA) of 1978 led to passage of the WPA in 1989.⁸ Those two Achilles heels were blamed for the CSRA's counterproductive track record: only four whistleblowers had formally won their cases out of some 4,000 complaints.⁹

Prior to passage of the WPA, the Merit Systems Protection Board consistently had adopted the test in *Mt. Healthy* for First Amendment relief. This test initially meant an employee must prove that protected speech played a "substantial" or "motivating" factor in the contested personnel decision, and gradually increased to requiring that retaliation was the "predominant" motivating factor.¹⁰ It effectively meant that an employee's preliminary burden was to prove the ultimate bottom line—retaliation was the dispositive factor when challenging termination or other actions.

A. The contributing factor test for a *prima facie* case.

New standards in the WPA¹¹ provided a more realistic test, both for a *prima facie* case and for the agency's affirmative defense. Now the Administrative Review Board must conclude

⁸ Pub. L. No. 101-12, 103 Stat. 16 (1989), (codified at 5 U.S.C. §§ 120-122 (1994 and Supp. III 1997)).

⁹ R. Vaughn and T. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Dissent*, 51 *Administrative Law Journal* 531, 534 n.16 (Spring 1999).

¹⁰ *Id.*, at 287; see also Warren, *supra*; H.R. Rep. No. 100-274, at 27 (1987); S. Rep. No. 100-413, at 13-14 (1988); 135 Cong. Rec. 4509 (1989) (statement of Sen. Levin); 135 Cong. Rec. 5035 (1989) (Joint Explanatory Statement, item 7) In the joint House and Senate Explanatory Statement on the legislation, Congress emphasized unequivocally that it "specifically intended to overrule existing case law, which requires a whistleblower to prove his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." 135 Cong. Rec. 5033 (1989).

¹¹ 5 U.S.C. §§ 1214(b)(4)(B)(i) (OSC litigation) and 1221(e)(1) (Individual Right of Action).

a *prima facie* case has been established when an appellant “has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor” in the challenged personnel action that was taken or is to be taken against the employee, former employee, or applicant.

Although there is no specific statutory definition of “contributing factor,” Congress left no ambiguity about its intent. During Floor speeches and consensus legislative histories, the primary sponsors repeatedly defined the burden as follows—“any factor, which alone or in connection with other factors, tends to affect in any way the outcome”¹² In effect, the change lowered the bar for a *prima facie* case from proving that whistleblowing was the decisive factor, to merely proving that whistleblowing was relevant for a personnel action. Without any intervening congressional action or even comment, the dissent in *Fordham* contends that whistleblowers again must defeat all the employer’s arguments on its grounds for an action, merely to establish a *prima facie* case.

¹² 135 Cong. Rec. 4509 (1989); *See id.* at 4518 (statement of Sen. Grassley); *id.* at 4522 (statement of Sen. Pryor); *id.* at 5033 (explanatory statement of Senate Bill 20); *id.* at 4522 (statement of Rep. Schroeder). This is the verbatim definition Senator Levin gave for a “material factor” in the original version of Senate Bill 508. 134 Cong. Rec. 19981 (1988) A concurring letter from Attorney General Thornburgh did not challenge that interpretation: “A ‘contributing factor’ need not be ‘substantial.’ The individual’s burden is to prove that the whistleblowing contributed in some way to the agency’s decision to take the personnel action.” 135 Cong. Rec. 5033 (1989)

This resolution affirming the 1988 level of proof reflected the strength of congressional support for whistleblowers, because it was a principal reason for President Reagan’s veto of the bill. The only difference between the 1988 and 1989 version of the WPA on this issue was to insert the word “contributing” in front of “factor,” which in 1988 had been unqualified initially in §§ 1214(b)(4)(B)(1) and 1221(e)(1).

Although the change satisfied the concerns of Attorney General Thornburgh about possible abuses, all parties agreed that it merely was a more precise synonym for what Congress had intended all long. “Contributing” refers to the relevance of evidence, not its significance. As amplified in the Explanatory Statement, “This is not meant to change or heighten, in any way, the standard in S. 20, which is that the disclosure must be ‘a factor’ in the action. The word ‘contributing’ is only intended to clarify that the factor must contribute in some way to the action against the whistleblower.” 135 Cong. Rec. 5033 (1989) When defining “contributing factor” Congress specified that the definition literally applied to the term “factor as well.” *Id.* *See also* the explanation of Senator Levin, the primary congressional negotiator with the White House for the 1989 consensus: “I believe this was clear in the original statutory language. To me, there was no doubt that a factor in an action is something that contributes to that action. Indeed, my dictionary defines a ‘factor’ as ‘one of the elements contributing to a particular result or situation.’” 135 Cong. Rec. 4509 (1989).

B. The clear and convincing evidence burden for an affirmative defense.

The final step in the *Mt. Healthy* standard is an affirmative defense for the employer. The burden of proof shifts, and the employer must demonstrate by a preponderance of the evidence that the personnel action would have occurred anyway in the absence of protected speech.¹³ While adopting this standard,¹⁴ the MSPB made it even more difficult for whistleblowers. In a 1987 decision, *Berube v. General Services Administration*,¹⁵ the MSPB reversed eight years of administrative precedents and all constitutional law, effectively replacing “would have” with “could have” acted for innocent reasons.¹⁶ By allowing after-the-fact justifications, MSPB invited new investigations to rationalize prior reprisals, and made it nearly impossible for whistleblowers to prevail. There is a skeleton in nearly everyone’s closet if the government looks hard enough.

Congress’s WPA revision to the legal standards for an affirmative defense essentially overturned *Berube* and completed codification of a modified *Mt. Healthy* standard more sympathetic to employees by raising the preponderance of evidence burden to a significantly tougher hurdle. Under 5 U.S.C. §§ 1214(b)(4)(B)(ii) and 1221(e)(2),¹⁷ MSPB may not order corrective action if the agency demonstrates through “clear and convincing evidence” that it “would have taken the same personnel action in the absence of such disclosure.” By imposing this test, Congress also conveyed an unequivocal message about its intention to reverse prior case law trends. Through the upgrade from a “preponderance of the evidence” standard to “clear

¹³ See *Mt. Healthy*, 429 U.S. at 287.

¹⁴ See *Gerlach v. Federal Trade Commission*, 8 M.S.P.B. 599 (1981).

¹⁵ 30 M.S.P.R. 581 (1986), remanded 820 F.2d 396 (Fed. Cir. 1987), 37 M.S.P.R. 448 (1988).

¹⁶ See *Berube*, 820 F.2d 396, 400-01 (Fed. Cir. 1987).

¹⁷ These provisions refer to OSC litigation and Individual Right of Action cases, respectively.

and convincing evidence,” Congress intended to place whistleblowing on a legal pedestal.¹⁸

At least on paper, it succeeded. Under longstanding legal norms, the substitution significantly increases the government’s burden. “Preponderance of the evidence” means “more likely than not,” or more than 50 percent.¹⁹ By contrast, “clear and convincing evidence” means the matter to be proven is “highly probable or reasonably certain.”²⁰ Indeed, since 1899 the standard as articulated by the California Supreme Court is evidence “so clear as to leave no substantial doubt” and “sufficiently strong as to command the unhesitating assent of every reasonable mind.”²¹ For civil service law, the Federal Circuit adopted an equivalent definition that the test requires “evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is ‘highly probable.’”²² A survey of judges revealed that in practice the standard requires a 70-80 percent quantum of evidence.²³

Accountability was a primary reason Congress created a far more difficult evidentiary standard for acceptance of what could be pretextual excuses to harass. There should be

¹⁸ Congress left no doubt that it intended a significant break from prior law. After summarizing the changes in the prima facie test and Mt. Healthy affirmative defense, Senator Cohen emphasized, “Those are important changes. They mark significant changes in existing law.” 135 Cong. Rec. 4517 (1989) The Explanatory Statement on Senate Bill 20 again put the intent in perspective:

By reducing the excessively heavy burden imposed on the employee under current case law, the legislation will send a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing and an equally clear message to those who would discourage whistleblowers from coming forward that reprisals of any kind will not be tolerated.

Whistleblowing should never be a factor that contributes in any way to an adverse personnel action. 135 Cong. Rec. 5033 (1989) (emphasis added).

¹⁹ *Brown v. Bowen*, 847 F.2d 342, 345-46 (7th Cir. 1988).

²⁰ *Ragbir v. Holder*, 389 Fed. Appx. 80, 2010 U.S. App. LEXIS 16860, quoting *Black’s Law Dictionary* 636 (9th Ed. 2009).

²¹ *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543 (1899).

²² *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993), quoting *Buildex, Inc. v. Kason Indus., Inc.*, 861 F.2d 1461, 1463 (Fed. Cir. 1988).

²³ McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 *Van L. Rev.* 1293, 1328-29 (1982) (presenting survey of 170 federal judges in which 112 assessed CCE as requiring a 70-80% quantum of proof, 26 requiring more and 31 requiring less); *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978), *aff’d*, 603 F.2d 1053, (2d Cir. 1979), *cert. denied*, 444 U.S. 1073, 62 L. Ed. 2d 755, 100 S. Ct. 1018 (1980).

heightened scrutiny for an action already established as partially illegal. Even if the laws were not analogous, that reasoning applies equally for corporate and government employers.

C. The “knowledge-timing” test.

The dissent in *Fordham* strenuously contends that the “knowledge-timing” test employed by the majority is unreliable and unfair—“a fiction created by a rigged process and, more importantly, contrary to the law and basic notions of fundamental fairness and logic.” *Fordham, supra*, at 41. That argument suggests that Congress was wrong, an invalid basis to reject statutory whistleblower rights on non-constitutional grounds.

The dissent also is wrong about congressional irrationality. The test was added after the Federal Circuit Court of Appeals had created an imposing roadblock to the new WPA contributing factor test. In *Clark v. Department of Army*,²⁴ the Court threatened to cancel the new whistleblower rights by holding that an employee fails the contributing factor test if an agency demonstrates it “could have” taken the action for legitimate reasons. Besides scrambling the employee and agency burdens of proof, the precedent permitted after-the-fact justifications for reprisal.

In the 1994 amendments to the WPA, Congress erased the threat from *Clark*. The WPA was revised so employees can successfully prove the connection between whistleblowing and prohibited personnel practice through a time lag. The employee:

may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—
(A) the official taking the personnel action knew of the disclosure or protected activity;
and

²⁴ 997 F.2d 1466 (Fed. Cir. 1993).

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.²⁵

As a matter of law, the employee establishes a *prima facie* case by passing this knowledge-timing test.²⁶

At the same time, Congress reemphasized its judgment on the proper context for attacks on the employee—the agency’s affirmative defense. Other than attacking that judgment, the dissent ignored directly relevant legislative history cited by the majority:

[T]he Whistleblower Protection Act creates a clear division between a whistleblower’s *prima facie* case, which must be proven by a preponderance of the evidence, and an agency’s affirmative defense, which must be proven by clear and convincing evidence. The [1994] amendment reaffirms that Congress intends for a[n] agency’s evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher [clear and convincing] burden of proof.²⁷

In addition to actively and passively rejecting Congress, the dissenting opinion also ignores the majority’s well-taken references that both judicial and administrative precedents deem it error to consider independent justification arguments in deciding the contributing factor element.²⁸ In every instance, the employee’s success in prevailing under the contributing factor test was a prerequisite for consideration of the employer’s independent justification under the clear and convincing evidence standard.

²⁵ 5 U.S.C. § 1221(e) (1994).

²⁶ *Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, 146 (2011); *Gonzalez v. Dept. of Transp.*, 109 M.S.P.R. 250, 259-60 (2009); *Carey v. Veterans Administration*, 93 M.S.P.R. 767, 681-82 (2003).

²⁷ S. Rep. No 103-358, at 6-7. On this issue, the dissent’s contempt extends to longstanding judicial precedent applying the knowledge-timing test outside the WEPA context. See, e.g., *Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002); *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000); *Connor v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997).

²⁸ *Fordham*, slip op. at 30, n. 74, citing *Kewley v. Dep’t of Health and Human Services*, 153 F.3d 1357, 1362-64 (Fed. Cir. 1998); *Grant v. Dep’t of Justice*, 61 MSPR 370, 376 (1994); and *Caddell v. Dep’t of Justice*, 52 MSPR 508, 513-17 (1993).

The dissent seeks to initiate a fundamental contradiction between the rights of government and corporate workers, despite identical statutory language. Further, the dissent seeks reversal of numerous, unanimous laws supported by extensive legislative history, not on constitutional grounds, but because it does not agree with them. That is not a valid option for the Board.

III. THE DISSENT'S PROPOSAL TO ELIMINATE TWO-PART BURDENS OF PROOF IS AN IRRATIONAL RESPONSE TO AN UNPROVEN PROBLEM.

Independent of the WPA, the dissent's concerns cannot withstand scrutiny on their face. The dissent in *Fordham* asserts that the majority decision disregards the requirement to consider the evidence as a whole in whistleblower cases,²⁹ and means that the employer's evidence will not be considered, even if lawful considerations were the only factors.³⁰

Those concerns cannot withstand linguistic scrutiny. A two-part test with reversing burdens of proof definitionally means both sides are heard. The parties present evidence to satisfy their burdens in consecutive arguments, instead of within the same argument. Second, the dissent loses under its own analogy of an employer and an observer both pushing a ball over the line. The only factor considered by the dissent for the contributing factor test is whether the observer helped in some way, without reference to the employer.³¹ The dissent's explanatory analogy defeats its own objection. /

²⁹ *Fordham*, *supra* at 45.

³⁰ *Id.*, at 41.

³¹ *Id.*, at 44.

Finally, the only time the employer's arguments will not be heard is if the employee fails to demonstrate a contributory factor. In that case, it will not matter, because the employer already will have won.

The dissent also contradicts its own recent Board authority in *Bobreski v. J. Givoo Consultants, Inc.*:

Where the complainant presents his case by circumstantial evidence, we repeatedly stated that the ALJ must consider "all" the evidence "as a whole" to determine if protected activity did or did not "contribute." By "all the evidence," we mean all the evidence that is relevant to the issue of causation Because contributory factor permits lawful reasons to co-exist with unlawful reasons, a complainant does not need to prove that lawful reasons were pretext.³²

By the dissent's own reasoning in *Bobreski*, whether or not the employer had lawful reasons, it is not necessary to disprove their validity after establishing that some were unlawful. That means the employer's other reasons, pretext or not, are irrelevant to determine the contributing factor element. *Amicus* does not contest that once the contributory factor element has been satisfied, any lawful reasons are relevant and that part of the "whole" record must be considered.

IV. THERE ARE NO PUBLIC POLICY DISADVANTAGES FROM MAINTAINING THE STATUS QUO.

A. There are no barriers to prevent circumvention of the whistleblower's case.

The dissent predicts that Administrative Law Judges merely will presume the contributing factor test has been met, and attempt to resolve the case solely on review of the

³² *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003 (Aug. 28, 2014), slip op. at 16-17.

employer's independent justification.³³ Indeed, that maneuver would deprive the whistleblower of an opportunity to prove that retaliation was a contributing factor.

The observation again contradicts the dissent's own reasoning. Any ALJ who skipped the employee's side of the story would engage in the same legal error repeatedly raised by the dissent—failure to consider the whole record.

Further, to the extent that any such practice emerged, it can be neutralized through minor repairs, without the necessity of canceling the structure for burdens of proof over the last 25 years. In Section 114 of Whistleblower Protection Enhancement Act of 2012, Congress further solidified both the two-part test and each party's right to present its evidence. An employer's independent justification affirmative defense cannot be considered unless the employee first has established a *prima facie* case under the contributing factor standard.³⁴ There is no barrier to the Board adopting the same safeguard in resolution of this case, which *amicus* recommends.

B. The two-part test eases the employer's burden.

Contradicting its other arguments that the majority in *Fordham* will not allow the employer's case to be considered, the dissent argues that the two-part test is unfair due to the clear and convincing evidence standard.³⁵ As discussed above, Congress properly reasoned that the heightened burden is appropriate for an action already determined to be partially illegal. In fact, however, the two-part test eases the burdens on employers. They do not have to present any evidence justifying an action unless the whistleblower has established a *prima facie* case of retaliation. Nor has the dissent demonstrated empirically that the standards have been unfair in

³³ *Fordham*, *supra* at 46.

³⁴ 5 U.S.C. § 1214(b)(4)(B)(ii); 5 U.S.C. § 1221(e)(2).

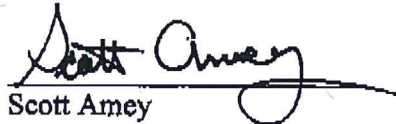
³⁵ *Fordham*, *supra* at 45.

practice. In 2012 Congress unanimously strengthened the WPA in the Whistleblower Protection Enhancement Act because it was still unrealistic for employees to challenge whistleblower retaliation.³⁶

CONCLUSION

Since its creation the current ARB rightfully has earned a legacy of restoring the legitimacy of 16 congressionally enacted whistleblower laws. The dissent in *Fordham* seeks to reverse that significant legacy, canceling doctrines that have modernized and made free speech rights credible over the last four decades. For the foregoing reasons, the Board should uphold the *Fordham* majority.

Respectfully submitted,



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³⁶ See generally S. Rep. 12-155 (2012).